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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR
PERIODICAL DISTRIBUTORS ASSOCIATIONS IN
SUPPORT OF PETITION FOR REHEARING

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**BRIEF *AMICUS CURIAE* IN SUPPORT OF
PETITION FOR REHEARING**

STATEMENT

This brief *amicus curiae* is submitted on behalf of the Council for Periodical Distributors Associations, Inc. ("CPDA"), with the consent of all parties to this action, in support of petitioners' petition for rehearing.

INTEREST OF THE *AMICUS CURIAE*

CPDA is a trade association representing almost 700 independent wholesale distributors of newspapers, paperback books and periodicals, located throughout the United States. These wholesalers are often the focus of efforts by public officials and private groups attempting to prevent the distribution of "objectionable" publications. Their liberty as well as their livelihood depends on their knowing

whether the publications they distribute are constitutionally protected. If they cannot know this with reasonable certainty their only protection lies in refusal to distribute all publications as to which any objection, not obviously frivolous, is made. When they are forced to follow this course, the public, which is denied access to controversial non-obscene publications, is the loser.

This Court's recent decisions in this and related obscenity cases* have created such confusion concerning the standard by which obscenity is to be judged that First Amendment rights are seriously being impaired. Wholesalers are no longer certain whether many publications, previously assumed to be constitutionally protected, may safely be handled. As a result they must reluctantly accede to all but the most absurd demands of state or self-appointed censors. They support this petition for rehearing in the hope that upon rehearing this Court will remove the uncertainty which plagues their industry and seriously interferes with the distribution of publications throughout the United States.

THE PRESENT CONFUSED STATE OF THE LAW OF OBSCENITY SERIOUSLY INTERFERES WITH THE DISTRIBUTION OF NON-OBSCENE LITERATURE. THIS COURT SHOULD, THEREFORE, GRANT THE INSTANT PETITION AND, UPON REHEARING, CLARIFY THE AMBIGUITIES INHERENT IN ITS EARLIER DECISION IN THIS CASE.

No group of persons read this Court's latest obscenity decisions with greater concern than did the 700 independent wholesalers on whose behalf this brief is submitted, for no branch of the nationwide network through which rapid

**A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts* (No. 368—October Term, 1965) and *Edward Mishkin v. State of New York* (No. 49—October Term, 1965).

distribution of dated periodicals and timely books is achieved throughout this country is more vulnerable to the censor's pruning.

At any given time a large wholesaler in a major city is distributing thousands of paperback books and scores of periodicals. None of them are authored, published or edited by him. He obtains most of them from one of the national distributors whose franchises he holds.* He neither controls nor influences the content of the publications or the advertising promoting them.

It is manifestly impossible for the wholesaler to read or review even a fraction of the titles he distributes. Nevertheless, as his community's principal supplier of readily available low-cost reading matter, and as the one person in the community through whose hands most such matter passes on its way to the public, the independent wholesaler is the one person to whom voluntary groups and government authorities interested in controlling the flow of publications into the community turn their attention.

Because he usually lives in or near the community in which his clearly visible distribution business is located, the wholesaler is highly susceptible to community pressures to which authors, publishers and national distributors, far removed from the community, are impervious.

As a member of his community, the wholesaler desires to avoid its censure and, of course, criminal prosecution, however unwarranted. He makes a good living out of the unexceptional publications. Marginal publications, some of which are of social significance, produce only a small fraction of the wholesaler's revenues. Moreover, the wholesaler's experience has encouraged him to believe that the

*Most periodicals and paperback books are distributed through one of 13 national distributors, each of whom is the sole distributor for the publications he distributes. The complete chain of distribution is as follows: publisher to national distributor to wholesaler to retailer to ultimate consumer.

reading public's dollar will purchase one publication if it cannot obtain another. It is thus immaterial to the wholesaler (though not to the publisher and prospective reader) whether he distributes only "safe" publications. This attitude, of course protects the wholesaler at the expense of the public interest.

When the foregoing facts are comprehended, the tremendous impact which this Court's recent obscenity decisions is having upon the distribution of law-cost reading matter throughout the country is better understood.

Prior to March 21 of this year, a wholesaler who was informed that a certain publication might be obscene could decide whether to distribute it in light of the reasonable, comprehensible and stable standards which this Court had announced in *Roth v. U. S.*, 354 U. S. 476 (1957), *Manual Enterprises, Inc. v. Day*, 370 U. S. 478 (1952), and *Jacobellis v. Ohio*, 378 U. S. 184 (1964). In applying these standards he was required to examine only the publication itself.

Since March 21, however, the wholesaler has been unable to judge whether many publications are constitutionally protected with any degree of certainty. He can no longer conclude that a publication is not obscene because it does not appeal to the prurient interest of the average member of his community; he must now consider whether the publication might appeal to the prurient interest of the members of some deviant group with which he has no familiarity. He can no longer rely upon his examination of the publication itself, but must undertake the impossible task of discovering whether someone else may have advertised the material in such a way that it has become the subject of "pandering".

Finally, if he should be prosecuted for distributing an allegedly obscene publication, the wholesaler can no longer assume that his unavoidable ignorance of its contents will

exonerate him (cf. *Smith v. California*, 361 U. S. 147 (1959)). In the present state of the law, it is at least uncertain whether a wholesaler's general familiarity with material advertising an "obscene" publication will defeat the defense of ignorance. Apparently wholesalers are now required not only to ponder the allegedly pornographic lines between lurid covers, but also to read between the lines of ambiguous and deliberately misleading advertising "come-ons".

Familiar with the insatiable demands of extremist vigilante groups and unable to judge whether many publications are constitutionally protected, wholesalers have no choice but to err on the side of caution. In self defense they must refuse to distribute any publication attacked as obscene by any self-appointed censor until their attorneys have had an opportunity to read the publication, consider the advertising being used to promote it, and discuss the matter with the complainant.* (This "temporary" withdrawal is obviously the equivalent of a permanent ban in the case of "dated" periodicals.)

We recognize that this Court, in all obscenity cases, attempts to balance the interests of public decency with vital First Amendment rights. When the Court attempted to reach that balance in its three obscenity decisions handed down on March 21 of this year it was not able to weigh the unintended effect its holding would have on wholesalers —a vital link in the publication distribution network. This effect is that these wholesalers would be forced to throw out the baby with the bath water. They cannot do otherwise in view of the vigilante pressures to which they are

*CPDA has already taken steps to implement the protective measures described above. Annexed as an appendix to this brief are the texts of letters which all members of CPDA have been advised to send to the publishers whose publications they distribute and to public officials charged with enforcing laws directed against obscene publications.

subjected, the confusion created by this Court's opinions, and the slight financial rewards which they derive from the sale of marginal publications, compared to the unknown risk associated with their distribution. Considering these factors, we suggest that the scales are not now in balance and a modification of the Court's earlier decision is in order.

CONCLUSION

Until this Court clarifies the confusion now pervading the law of obscenity, wholesalers, who control neither the content nor the advertising of the publications they distribute, will refuse to distribute many publications to which objection is made. This will necessarily result in substantial interference with the distribution of many non-obscene publications. Consequently, this Court should grant this petition for rehearing and take advantage of the opportunity to clarify the law of obscenity which a rehearing will present.

Respectfully submitted,

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APPENDIX

Suggested Text of Letter to Publishers

Various groups in the areas of our distribution have been very active in recent months in efforts to combat the flood of borderline titles being distributed.

We make an effort to review publications before distribution and in some cases return those which we feel would involve us with law enforcement officials. However, we are neither editors nor censors and we simply cannot adequate review the thousands of titles of books and weekly and monthly and other periodicals which we distribute. As publishers (and the distributors who represent them) you know the nature and contents of publications—and the methods of advertising and promotion—whereas we cannot possibly know what we distribute because of the large volume of materials we handle. For the sake of a few dollars we do not intend to jeopardize our healthy business which is based on distribution of fine periodicals nor do we intend to compromise our moral principles or our community-wide reputation.

We must insist that effective immediately you do not ship us any periodicals or books which do not meet the standards outlined by the Supreme Court, in its three most recent opinions in "obscenity cases". If you are in doubt as to the legality of any title or the sales promotion behind it, do not ship it to us.

*Appendix***Suggested Text of Letter to Law Enforcement Officials**

I may have written at an earlier date either to you or your predecessor explaining that I am the owner of the News Agency which distributes newspapers, magazines and pocket size books in In any event, and in light of the recent Supreme Court decisions, I want to state a position which has always been my policy in the operation of my business:

Our Company distributes approximately periodicals monthly and, in addition, we have several thousand other titles, mainly books, under continuous distribution. The latter run from thousand year old classics to the most current detective fiction. It is, of course, impossible for us to know the contents of even a fraction of the materials we distribute. However, it has been—and is—our policy to represent responsible national distributors who, as we, hold franchises from responsible publishers. We do not undertake distribution of so-called "fly-by-night" publishers or insubstantial national distributors. And, of course, we cannot be responsible for the many publications which are not distributed by us.

You will understand, of course, that various people have from time to time complained of the contents of Life Magazine, Saturday Evening Post, and other representative publications which are regularly distributed. I cannot possibly, therefore, stay in business and perform my responsibility to the publishers whose franchise I hold and be 100% sure that some person, indeed some group, will not find what I distribute to be objectionable. Yet, I do not want to and will not flaunt the opinion and the holding of any recognized public authority. I am absolutely deter-

Appendix

mined, so far as I can prevent it, not to violate any laws. My reputation and that of the retailers who distribute under the franchises which I hold, are too valuable to jeopardize by the distribution of obscene literature. That is not my business nor the business of my retailers who are, in the most cases, local businessmen and residents of our community.

I wish to state categorically that when a complaint is made to you that a certain issue of a publication is obscene and you are sufficiently convinced of that fact so as to believe that legal action is warranted, if you will contact me, I shall withdraw the publication from circulation immediately in your jurisdiction. It may be that after a careful review, both your office and I will be satisfied that the matter is not obscene. But it is absolutely unnecessary, as far as I am concerned, for you to take any official action to obtain the removal of questionable publications from the stands in your jurisdiction other than for you to call upon me to do so. By the use of this procedure, the public can be protected until all the circumstances are carefully considered and your office and I can have an opportunity to carefully review the publication, which, in the majority of instances, neither I nor the retailer could possibly have read.

In order to make my position on this crystal clear I am enclosing a copy of a letter which I have sent to every publisher whose material I sell and to every distributor who is a source of supply to me.